187 (2)

No. 10-940

In the Supreme Court of the United States

TUSHAR PRAVINKUMAR GOR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Board of Immigration Appeals' decision not to exercise its discretionary authority to reopen petitioner's immigration proceedings *sua sponte* is unreviewable.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 29

TABLE OF AUTHORITIES

Cases:

Ali v. *Gonzales*, 448 F.3d 515 (2d Cir. 2006) 20
Argueta v. *Holder*, 617 F.3d 109 (2d Cir. 2010) 23
Barry v. *Mukasey*, 524 F.3d 721 (6th Cir. 2008) 9, 20
Belay-Gebru v. *INS*, 327 F.3d 998 (10th Cir. 2003) ... 21, 24
Bernal-Vallejo v. *INS*, 195 F.3d 56 (1st Cir. 1999) ... 23, 26
C-V-T-, *In re*, 22 I. & N. Dec. 7 (B.I.A. 1998) 2, 3
Calle-Vujiles v. *Ashcroft*, 320 F.3d 472 (3d Cir. 2003) ... 20
Cardoso-Tlaseca v. *Gonzales*, 460 F.3d 1102 (9th Cir. 2006) 23
Cevilla v. *Gonzales*, 446 F.3d 658 (2006) 25
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968) 14
Cruz v. *United States Att'y Gen.*, 452 F.3d 240 (3d Cir. 2006) 24
Dada v. *Mukasey*, 554 U.S. 1 (2008) 14, 16
Ekimian v. *INS*, 303 F.3d 1153 (9th Cir. 2002) 21
Enriquez-Alvarado v. *Ashcroft*, 371 F.3d 246 (5th Cir. 2004) 20
G-D-, *In re*, 22 I. & N. Dec. 1132 (B.I.A. 1999) 4, 27
Gashi v. *Holder*, 382 Fed. Appx. 21 (2d Cir. 2010) 21

Cases—Continued: Page

Guled v. *Mukasey*, 515 F.3d 872 (8th Cir. 2008) 2
Harchenko v. *INS*, 379 F.3d 405 (6th Cir. 2004) ... 9, 11, 12
Heckler v. *Chaney*, 470 U.S. 821 (1985) 9, 12
INS v. *Abudu*, 485 U.S. 94 (1988) 3
INS v. *Doherty*, 502 U.S. 314 (1992) 4
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 2
ICC v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987) 28
Jaimes-Aguirre v. *United States Att'y Gen.*, 369 Fed. Appx. 101 (11th Cir. 2010) 21
Kucana v. *Holder*, 130 S. Ct. 827 (2010) 9, 16, 17, 22
Lenis v. *United States Att'y Gen.*, 525 F.3d 1291 (11th Cir. 2008) 13, 21, 25
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 12
Luis v. *INS*, 196 F.3d 36 (1st Cir. 1999) 20, 26
Marin, In re, 16 I. & N. Dec. 581 (B.I.A. 1978) 3
Mejia-Hernandez v. *Holder*, 633 F.3d 818 (9th Cir. 2011) 21
Mendiola v. *Holder*, 585 F.3d 1303 (10th Cir. 2009) 23
Mosere v. *Mukasey*, 552 F.3d 397 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009) 20, 24
Nawaz v. *Holder*, 314 Fed. Appx. 736 (5th Cir. 2009) 23
Neves v. *Holder*, 613 F.3d 30 (1st Cir. 2010), petition for cert. pending, No. 10-1030 (filed Feb. 14, 2011) 11, 21
Ochoa v. *Holder*, 604 F.3d 546 (8th Cir. 2010), petition for cert. pending, No. 10-920 (filed Jan. 18, 2011) 11, 21

Cases—Continued: Page

Ozeiry v. *Attorney Gen.*, 400 Fed. Appx. 647 (3d Cir. 2010) 21
Pilch v. *Ashcroft*, 353 F.3d 585 (7th Cir. 2003) 20
Pllumi v. *Attorney Gen.*, No. 09-4454, 2011 WL 1278741 (3d Cir. Apr. 6, 2011) 21, 25
Rosario v. *Holder*, 627 F.3d 58 (2d Cir. 2010) 23
Sharma v. *Holder*, 633 F.3d 865 (9th Cir. 2011) 21
Stone v. *INS*, 514 U.S. 386 (1995) 14, 15
Tamenut v. *Mukasey*, 521 F.3d 1000 (8th Cir. 2008) 12, 18, 21, 25
Webster v. *Doe*, 486 U.S. 592 (1988) 19
Zhang v. *Holder*, 617 F.3d 650 (2d Cir. 2010) 15, 16

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701(a)(2) 12, 21, 28
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-593 16
Immigration Act of 1952, Pub. L. No. 82-414, ch. 414, 66 Stat. 163:
§ 103(a), 66 Stat. 173 15
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1103(g) 12
8 U.S.C. 1227(a)(2)(E)(i) 5
8 U.S.C. 1229a(c)(4)(A)(i) 2
8 U.S.C. 1229a(c)(7) 17
8 U.S.C. 1229a(c)(7)(A) 3

Statutes and regulations—Continued: Page

8 U.S.C. 1229a(c)(7)(B) 3
8 U.S.C. 1229a(c)(7)(C) 11
8 U.S.C. 1229a(c)(7)(C)(i) 3
8 U.S.C. 1229b (2006 & Supp. III 2009) 2, 6
8 U.S.C. 1229b(a) 2
8 U.S.C. 1252 14
8 U.S.C. 1252(a) 11, 18
8 U.S.C. 1252(a)(2)(B) 19, 22, 24
8 U.S.C. 1252(a)(2)(B)(ii) 9, 10, 17, 18
8 U.S.C. 1252(a)(2)(C) 24
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(b)(1) 11
8 U.S.C. 1252(b)(6) 13, 14
8 C.F.R.:
Section 1003.1(e)(4) 7
Section 1003.2(a) 4, 7, 8
Section 1003.2(c) 3
Section 1003.2(c)(1) 3
Section 1003.2(c)(2) 3
Section 1003.2(d) 23
Section 1003.23(b) 3
Section 1003.23(b)(1) 3, 4
Section 1003.23(b)(3) 3, 4
Section 1240.8(d) 2
Ohio Rev. Code § 2919.21(B) 4
17 Fed. Reg. 11,475 (1952) 15

Miscellaneous—Continued: Page

23 Fed. Reg. 9118-9119 (1958) 15

61 Fed. Reg. (1996):

p. 18,900 16

p. 18,905 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 607 F.3d 180. The decision of the Board of Immigration Appeals (Pet. App. 43a-45a) denying petitioner's request that the Board reopen his proceedings *sua sponte* is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2010. A petition for rehearing was denied on October 5, 2010 (Pet. App. 46a-47a). On December 13, 2010, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 3, 2011, and the petition was filed on January 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The discretion of the Attorney General to grant relief from removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. See, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008). The alien bears the burden of proving eligibility for cancellation of removal. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d).

To demonstrate statutory eligibility for cancellation of removal, an alien who is a lawful permanent resident must show that he has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony. 8 U.S.C. 1229b(a).

In addition to satisfying the statutory eligibility requirements, an applicant for cancellation of removal must establish that he warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). Whether an applicant warrants discretionary cancellation of removal is a case-specific determination made by "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf

to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

b. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23(b) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). When the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see 8 C.F.R. 1003.23(b)(3) (IJ). An alien is entitled to file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJs and the Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case

for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJs); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or Board that his case should be reopened *sua sponte*. The IJ or the Board may exercise discretion to reopen an alien's case *sua sponte* at any time. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of India who was admitted to the United States as a lawful permanent resident in February 1985. Pet. App. 3a. Petitioner fathered two children in the United States out of wedlock. Pet. App. 3a; Administrative Record (A.R.) 121. He neither lived with nor supported those children. A.R. 122-123, 153.

In September 2004, petitioner was convicted on four counts of felony non-support of minor children, in violation of Ohio Revised Code § 2919.21(B), and was sentenced to three years of community control. Pet. App. 3a; A.R. 140-141, 216-222. In May 2006, he was convicted on three additional felony counts of violating the same statute and was sentenced to two years of imprisonment. Pet. App. 3a-4a; A.R. 140-141, 223-230.

The former Immigration and Naturalization Service charged petitioner with being removable as an alien who

has been convicted of a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment. Pet. App. 4a; A.R. 241-243; see 8 U.S.C. 1227(a)(2)(E)(i).

Petitioner first appeared before an IJ in October 2006. Pet. App. 4a; A.R. 132-134.[1] He appeared pro se; the IJ notified him of his right to have a lawyer represent him and offered to provide him with a "list of organizations that might represent [him] at low cost or no charge." A.R. 133-134. Petitioner confirmed that he understood his right to retain an attorney and indicated that he wanted more time to hire one. Pet. App. 4a; A.R. 134. The IJ continued the case for one month. *Ibid.*

In November 2006, petitioner again appeared before the IJ pro se and asked for additional time to retain counsel. A.R. 135-137. The IJ continued the case for three months. *Id.* at 137. The IJ advised petitioner that if he did not obtain a lawyer by his next hearing, he would have to proceed without one. Pet. App. 4a; A.R. 136-137. Petitioner told the IJ that he understood. A.R. 137.

In February 2007, petitioner once again appeared before the IJ pro se. Pet. App. 4a-5a; A.R. 138-143. He conceded that he was removable as charged. Pet. App. 5a; A.R. 140-141. In response to the IJ's questioning, petitioner indicated that he intended to apply for asylum. Pet. App. 5a; A.R. 141-142. The IJ continued the case to allow petitioner to file an asylum application. *Ibid.* The IJ again reminded petitioner that he could secure a lawyer to represent him at the next hearing. A.R. 142.

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[1] Petitioner appeared via videoconference for each of his hearings because he was incarcerated at the time.

In April 2007, petitioner appeared pro se for the merits hearing on his application for relief from removal. A.R. 144-165. He had decided not to file an asylum application; instead, he filed an application for discretionary cancellation of removal under 8 U.S.C. 1229b. Pet. App. 5a; A.R. 207-214.

After a hearing, the IJ found petitioner removable as charged and denied his application for cancellation of removal. A.R. 126-131. Although the IJ determined that petitioner was statutorily eligible for cancellation of removal, he denied petitioner's application as a matter of discretion. A.R. 127-130. The IJ reached this conclusion by balancing the positive factors in favor of allowing petitioner to remain in the United States against his negative factors. A.R. 127-128 (citing *In re Marin*, *supra*). The IJ found that there was one positive factor—petitioner's longtime residence in the United States. A.R. 128. The IJ then found that there were numerous negative factors. He noted that petitioner had fathered two children in the United States, but that they live with their mother and petitioner has rendered "little or no support to these children," either as financial support or "moral support." *Ibid.*; see A.R. 129-130 (finding no evidence that petitioner "has been providing them with any parental guidance"). The IJ also determined that petitioner's seven felony convictions for failure to pay child support were significant negative factors, especially because petitioner had been "given two opportunities" to rectify the problem and failed to do so. A.R. 129.

Further, the IJ observed that petitioner had a "poor" employment record, which included four short-term jobs, the last of which he left because "he was using drugs." A.R. 128. The IJ noted that petitioner "has a

history of drug use" and did not "participate in any programs to rehabilitate himself" until "after he was arrested" and imprisoned. A.R. 129. The IJ also found as a negative factor that petitioner has not paid his taxes regularly. A.R. 130. Finally, the IJ noted that although petitioner has one brother who lives in the United States, his parents live in India. *Ibid.*

The IJ concluded that petitioner's many negative factors—failure to support his children, his poor employment record, his drug use, and his failure to pay taxes—outweighed the one positive factor, the length of petitioner's residence in the United States. A.R. 129-130. Accordingly, the IJ determined that petitioner did not warrant a grant of cancellation of removal in the exercise of discretion and ordered him removed to India. A.R. 130.

3. Petitioner appealed the IJ's decision to the Board. A.R. 100-110. He argued that the IJ erred in deciding that the negative factors in his case outweighed the positive factors and in denying him cancellation of removal as a matter of discretion. A.R. 105-110.

The Board summarily affirmed the IJ's decision without issuing a separate opinion, making the IJ's decision the final agency determination. A.R. 51; 8 C.F.R. 1003.1(e)(4).

4. Petitioner did not seek judicial review of the Board's decision. Seven months after the Board's decision, petitioner, through counsel, suggested to the Board that it exercise its *sua sponte* authority to reopen his case under 8 C.F.R. 1003.2(a). A.R. 17-30. He contended that: (1) the IJ failed to follow agency regulations because he failed to determine whether petitioner received a list of low-cost legal representatives; (2) the IJ erred in proceeding with petitioner's removal hearing

after several continuances because petitioner had not retained a lawyer; (3) the IJ erred in finding petitioner removable; and (4) the IJ erred in failing to determine whether petitioner was eligible for another form of discretionary relief, such as adjustment of status or voluntary departure. *Ibid.* Petitioner did not challenge the IJ's denial of his application for cancellation of removal.

The Board denied petitioner's motion. Pet. App. 43a-45a. The Board noted that because petitioner filed his motion more than 90 days after entry of his final order of removal, the Board could reopen proceedings only if it decided to exercise its *sua sponte* authority under 8 C.F.R. 1003.2(a), and the Board has reserved *sua sponte* reopening for "exceptional situations." Pet. App. 44a (citing cases; internal quotation marks omitted).

The Board examined petitioner's claims and concluded that, based on the record, his case did not present the sort of "exceptional situation" that might warrant reopening a case with a final removal order *sua sponte*. Pet. App. 44a. The Board explained that "all of the claims raised by [petitioner] in the motion could have been presented to the Board on appeal," but petitioner failed to raise any of those issues at that time. *Ibid.* The Board also noted that the "recent case law" upon which petitioner relied (A.R. 19) either "arises outside of the Sixth Circuit," the circuit "whose case law applies to this appeal," or was "unpublished or not directly relevant to [petitioner's] case." Pet. App. 44a-45a. Accordingly, the Board declined to exercise its discretionary authority to reopen proceedings *sua sponte*. *Id.* at 45a.

5. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-42a. The court noted that petitioner had conceded his removability, that he did not

seek judicial review of his final removal order, and that he did not file a motion to reopen proceedings within the time limits specified by statute. *Id.* at 5a-6a, 8a-10a. Instead, the court observed, petitioner waited until several months after his removal order became final and then asked the Board to reopen his case on its own motion. *Id.* at 10a. Relying on its prior precedents, the court held that the Board's decision not to reopen an alien's case *sua sponte* is not judicially reviewable. *Id.* at 15a-16a (citing *Harchenko* v. *INS*, 379 F.3d 405, 410-411 (6th Cir. 2004), and *Barry* v. *Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008)). The court explained that the decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law, and that there are no meaningful standards against which to judge the agency's exercise of discretion. *Id.* at 15a-16a (citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985)). The court adhered to this circuit law, although it suggested that the issue should be reconsidered en banc in light of this Court's recent decision in *Kucana* v. *Holder*, 130 S. Ct. 827 (2010). Pet. App. 23a.[2]

Chief Judge Batchelder concurred, agreeing that the Board's decision not to reopen a case *sua sponte* is not judicially reviewable and explaining why *Kucana* did not change that conclusion. Pet. App. 29a-35a. She explained that "[t]his case is fundamentally different from *Kucana*" for two reasons: (1) *Kucana* concerned statutory interpretation—namely, the question whether 8 U.S.C. 1252(a)(2)(B)(ii) by its terms precludes judicial review of timely motions to reopen—not the question

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[2] The court also held that it lacked jurisdiction to review the Board's original decision denying petitioner's application for cancellation of removal. Pet. App. 2a. Petitioner does not challenge that holding before this Court.

whether certain decisions are unreviewable because they are committed to agency discretion by law, Pet. App. 29a-31a; and (2) "there is a world of difference between the immigrant's *statutory* right to file a motion to reopen, which was at issue in *Kucana*, and the discretionary right of the [Board]—a right neither granted nor addressed by Congress—to reopen *sua sponte*," because "[t]he power of the [Board] to reopen *sua sponte* arises only from its own regulations" and "Congress has taken no steps to establish an individual right applicable to [petitioner]," *id.* at 31a-33a.

Judge Cole concurred in part and concurred in the judgment, stating his view that although *Kucana* addressed only the statutory-interpretation question "whether § 1252(a)(2)(B)(ii) bars appellate review of [Board] decisions to deny timely motions to reopen" and the Court specifically "disclaimed expressing any opinion on" the reviewability of Board decisions not to reopen cases *sua sponte*, the *Kucana* Court's "rationale" suggests that Board decisions not to reopen proceedings *sua sponte* should be judicially reviewable. Pet. App. 35a-42a.[3]

6. Petitioner filed a petition for rehearing en banc, which was denied, with no judge in active service calling for a vote on the petition. Pet. App. 46a-47a.

ARGUMENT

Petitioner contends (Pet. 11-33) that the court of appeals erred in holding that the Board's decision not to

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[3] The Department of Homeland Security reports that petitioner was removed to India in December 2008, while his petition for review of the Board's decision not to reopen his case *sua sponte* was pending. Petitioner had sought a stay of removal from the court of appeals, which was denied. 08-3859 Order (6th Cir. Dec. 11, 2008).

exercise its discretion to reopen his case *sua sponte* is unreviewable. The court of appeals' decision is correct, and it does not conflict with any decision of another court of appeals or of this Court. Moreover, this case would present a poor vehicle to review the question because petitioner based his request for *sua sponte* reopening entirely on claims that were previously available during his removal proceedings but that he either declined to present or affirmatively conceded. Further review is therefore unwarranted.[4]

1. The court of appeals correctly held that the Board's decision not to reopen petitioner's immigration proceedings *sua sponte* is unreviewable. Petitioner did not seek judicial review of his final order of removal, Pet. App. 6a; see 8 U.S.C. 1252(a) and (b)(1) (authorizing judicial review of final removal orders), and he did not file a motion to reopen immigration proceedings within the time frame Congress prescribed, Pet. App. 9a-10a; see 8 U.S.C. 1229a(c)(7)(C) (motion to reopen generally must be filed within 90 days of final removal order). Instead, petitioner waited until seven months after his removal order became final and then requested the Board to reopen his case on its own motion. The Board declined to take that extraordinary step, Pet. App. 43a-45a, and the court of appeals, relying on circuit precedent, held that the Board's decision not to reopen proceedings *sua sponte* is not judicially reviewable, *id.* at 15a-16a.

a. The court of appeals correctly recognized that the Board's decision not to exercise its authority to reopen

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[4] The question presented in this case is also presented in the pending petitions in *Ochoa* v. *Holder*, petition for cert. filed, No. 10-920 (Jan. 18, 2011), and *Neves* v. *Holder*, petition for cert. filed, No. 10-1030 (Feb. 14, 2011).

proceedings *sua sponte* is not judicially reviewable because it is committed to the Board's discretion by law. As the court observed, "[t]he decision whether to invoke *sua sponte* authority is committed to the unfettered discretion of the [Board]"; "[t]herefore, the very nature of the claim renders it not subject to judicial review." Pet. App. 15a (quoting *Harchenko*, 379 F.3d at 410-411). Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2); see *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993); *Heckler* v. *Chaney*, 470 U.S. 821, 829-831 (1985). That is true with respect to *sua sponte* reopening, because the decision whether to reopen a case is entirely discretionary and there are no meaningful standards or guidelines to review the Board's decision. Pet. App. 15a-16a; see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (per curiam) (en banc). As the court of appeals previously has explained, the Board's regulation addressing *sua sponte* reopening "provides no standard by which to judge the agency's exercise of discretion"; the regulation "allows the [Board] to reopen proceedings in exceptional situations," but "does not require the [Board] to do so." *Harchenko*, 379 F.3d at 411. Indeed, the regulation governing *sua sponte* reopening "was promulgated pursuant to a general grant of regulatory authority that sets no standards for this decision" (see 8 U.S.C. 1103(g)), and the regulation "provides no guidance as to the [Board's] appropriate course of action, sets forth no factors for the [Board] to consider in deciding whether to reopen *sua sponte*, places no constraints on the [Board's] discretion, and specifies no standards for a court to use to cabin the [Board's] discretion." *Tamenut*, 521 F.3d at 1004. The regulation does not

require the Board to reopen a removal proceeding under any particular circumstances. Rather, it simply provides the Board the discretion to reopen proceedings if and when it elects to do so.

Furthermore, unlike the statutory and regulatory provisions allowing an alien to file one motion to reopen, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. See *Lenis* v. *United States Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008) (the regulation permitting *sua sponte* reopening "merely provides the [Board] the discretion to reopen immigration proceedings as it sees fit") (citation omitted). As Chief Judge Batchelder explained in her concurring opinion below, Congress has not conferred upon aliens any rights with respect to *sua sponte* reopening: "[t]he power of the [Board] to reopen *sua sponte* arises only from its own regulations," and "Congress has taken no steps to establish an individual right applicable to [aliens]." Pet. App. 32a (Batchelder, C.J., concurring).

Moreover, the purposes of the INA, and of its judicial review provisions, would be undermined if decisions by the Board not to exercise its discretionary *sua sponte* reopening authority were subject to judicial review. Congress enacted statutory provisions governing motions to reopen and judicial review in 1990 and 1996 in order to prevent abuses of motions to reopen by imposing time and numerical limitations on such motions, shortening the time for judicial review, and requiring the consolidation of petitions for judicial review of the denials of motions to reopen with the petition for review of the final order of removal (see 8 U.S.C. 1252(b)(6)).

Those changes were adopted for the purpose of expediting the process of administrative and judicial review, the final resolution of removal proceedings, and the actual removal of the alien. See *Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008); *Stone* v. *INS*, 514 U.S. 386, 393-394 (1995). A determination by the Board not to exercise its discretion to reopen a case *sua sponte* may be made many months or more after the order of removal became final, the time for filing a motion to reopen had expired (or such a motion had been denied), and the time for judicial review had expired. If such determinations were then judicially reviewable, the result would be to circumvent the time and numerical limits Congress imposed on judicial review. An alien, simply by requesting an IJ or the Board to reopen a case *sua sponte*, could thereby trigger one or more new rounds of judicial review, perhaps seeking stays of removal, and creating delays and congestion in the courts. The potential for those consequences weighs heavily against recognizing a right of judicial review.[5]

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[5] Indeed, there is substantial reason to question whether Congress contemplated that a Board decision not to reopen proceedings *sua sponte* is the sort of decision over which a court of appeals would even have *jurisdiction* when it authorized judicial review of final removal orders in 8 U.S.C. 1252. The INA provides an alien with the right to file one motion to reopen, subject to specified time and other limits; it makes sense that Congress would have expected that denials of such motions would be judicially reviewable in light of the fact that Congress authorized such motions by statute. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968) (predecessor statute to Section 1252 contemplates judicial review of "only those determinations made during a [removal] proceeding," "including those determinations made incident to a *motion* to reopen such proceedings" (emphasis added)); 8 U.S.C. 1252(b)(6) (judicial review of "*motion* to reopen or reconsider" shall be consolidated with petition for review of an underlying removal order (emphasis

That conclusion is strongly supported by the history of the Board's *sua sponte* reopening authority. Congress enacted the INA in 1952, see Pub. L. No. 82-414, § 103(a), 66 Stat. 163, 173, charging the Attorney General "with the administration and enforcement" of the Act, and authorized him to "establish such regulations * * * as he deems necessary for carrying out [that] authority." Pursuant to that delegated authority, the Attorney General promulgated a series of regulations defining the"[p]owers of the Board," which included the power to "reopen * * * any case in which a decision has been made by the Board." 17 Fed. Reg. 11,475, §§ 6.1(b) and (d), 6.2 (1952). In 1958, the Attorney General clarified that the Board may reopen proceedings in response to a motion by the parties or on its own motion. See 23 Fed. Reg. 9118-9119, § 3.2; see also *Zhang* v. *Holder*, 617 F.3d 650, 656 (2d Cir. 2010).

Moreover, Congress has addressed motions to reopen filed by aliens, but it has never addressed the Board's *sua sponte* reopening power. In 1990, Congress became concerned that aliens illegally present in the United States were filing motions to reopen to prolong their stay, and it directed the Attorney General to

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added)). But an alien has no personal right in connection with *sua sponte* reopening of final removal proceedings. It therefore is not obvious that Section 1252 contemplates review of the Board's exercise of its own discretion on such matters, which occurs after a removal order has become final and the alien has no right to further agency review. That is especially so because to authorize judicial review of decisions not to reopen a case *sua sponte* would extend immigration proceedings substantially, contrary to the need for finality that Congress has recognized in several provisions in the INA. See *Stone*, 514 U.S. at 399-400 (noting Congress's concern that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States" (internal quotation marks omitted)).

issue regulations to limit the number of motions to reopen an alien may file and the time period for filing such motions. See *Dada* v. *Mukasey*, 554 U.S. 1, 13 (2008). After the Attorney General promulgated those regulations, see 61 Fed. Reg. 18,900, 18,905 (1996), Congress codified key portions of them, providing that each alien may file one motion to reopen, subject to specified time and other limits. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593. Notably, Congress said nothing about the Board's *sua sponte* reopening authority. Thus, although Congress has decided that aliens have a personal right under the INA to file one motion to reopen within the time limit specified, it has "taken no steps to establish an individual right" for aliens to seek or obtain *sua sponte* reopening, instead leaving that discretionary mechanism entirely to the Board, Pet. App. 32a (Batchelder, C.J., concurring); see *Zhang*, 617 F.3d at 662 (noting that although Congress codified standards for timely motions to reopen based on new evidence, it "was silent as to * * * the [Board's] *sua sponte* authority"). Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and is not reviewable by a court.

b. Petitioner makes essentially two arguments about how in his view the court of appeals erred. First, he contends that after this Court's recent decision in *Kucana* v. *Holder*, 130 S. Ct. 827, 834 (2010), *all* Board decisions not to reopen a case *sua sponte* are judicially reviewable. Pet. 12, 18-24. Second, he argues that even if such decisions generally are not judicially reviewable, the Board's decision not to exercise its *sua sponte* authority in *his* case is reviewable because it raises consti-

tutional claims or questions of law. Pet. 12, 24-32. Neither argument is correct.

i. Petitioner is mistaken in arguing that all decisions by the Board not to exercise its *sua sponte* authority are judicially reviewable after *Kucana*. As petitioner himself recognizes (Pet. 8), *Kucana* did not address judicial review of a denial of *sua sponte* reopening. The question in *Kucana* was one of statutory interpretation: whether 8 U.S.C. 1252(a)(2)(B)(ii), which states that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," applies to actions the discretionary authority for which is specified in *regulations*, rather than the relevant statutory subchapter. 130 S. Ct. at 831. The Court concluded that Section 1252(a)(2)(B)(ii) does not bar judicial review of determinations that are made discretionary by regulation, such as determinations on an alien's motion to reopen under 8 U.S.C. 1229a(c)(7). 130 S. Ct. at 836-837.

In the decision below, the reviewability of the Board's decision did not depend on Section 1252(a)(2)(B)(ii), the statutory provision at issue in *Kucana*. Instead, the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable because it is committed to agency discretion by law, an issue that was not addressed in *Kucana*. Pet. App. 15a-16a. Indeed, the *Kucana* Court specifically stated that it "express[ed] no opinion on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*," while noting that 11 courts of appeals had held that "such decisions are unreviewable because *sua sponte* reopening is com-

mitted to agency discretion by law." 130 S. Ct. at 839 n.18 (citing *Tamenut*, 521 F.3d at 1003-1004).

Contrary to petitioner's contention (Pet. 19), *Kucana*'s "logic" does not lead to the conclusion that denials of *sua sponte* reopening are reviewable. The answer to that question turns on whether the regulation authorizing *sua sponte* reopening confers private rights and whether it imposes standards to guide agency decisionmaking. By contrast, the issue in *Kucana* was whether the exercise of jurisdiction to review the denial of a *motion* to reopen, which the alien had a personal statutory right to file, was precluded by a certain statutory provision, 8 U.S.C. 1252(a)(2)(B)(ii). The Court's interpretation of the statute at issue in *Kucana* simply does not speak to the question whether the decision whether to reopen a case *sua sponte* is committed to agency discretion and is for that reason unreviewable. Therefore, nothing in the *Kucana* Court's holding or rationale supports judicial review of Board decisions not to exercise *sua sponte* reopening authority.

ii. Alternatively, petitioner contends (Pet. 24-33) that even if decisions not to reopen *sua sponte* generally are unreviewable because they are committed to agency discretion by law, courts may review the Board's decision not to reopen his case *sua sponte* because he raised "constitutional and legal questions." Petitioner's argument rests on 8 U.S.C. 1252(a)(2)(D), which provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law

> raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Ibid.

Section 1252(a)(2)(D) does not apply here. By its plain text, Section 1252(a)(2)(D) provides a rule of construction for certain provisions of the INA that "limit[] or eliminate[] judicial review." 8 U.S.C. 1252(a)(2)(D). Denials of *sua sponte* reopening are not made unreviewable due to a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8. Instead, they are unreviewable as committed to agency discretion by law, because the regulations allowing the Board to reopen or reconsider a case on its *own* motion create no privately enforceable right and because there are no judicially manageable standards to evaluate the agency's exercise of its discretion. See pp. 11-16, *supra*.[6] Because Section 1252(a)(2)(D) is inapplicable here by its terms, it lends no support to petitioner's argument that the Board's decision not to exercise its *sua sponte* reopening discretion is judicially reviewable.[7]

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[6] Although the government did cite 8 U.S.C. 1252(a)(2)(B) in its brief to the court of appeals, the government's argument was that the Board's decision is unreviewable because it is committed to agency discretion by law, not because review is precluded under Section 1252(a)(2)(B) or any other portion of the INA. See Gov't C.A. Br. 12-13.

[7] Petitioner's argument that constitutional and legal claims are reviewable has been premised entirely on Section 1252(a)(2)(D). See Pet. C.A. Resp. to Mot. to Dismiss 3, 8-9. Petitioner also cites (Pet. 26) *Webster* v. *Doe*, 486 U.S. 592, 603 (1988), for the proposition that Congress must be clear in foreclosing judicial review of constitutional claims. But petitioner has not been denied judicial review of any constitutional or statutory claims in connection with his removal order: judicial review was available at the time of his original removal order, and if he had raised them in his challenge to the Board's decision or in

Moreover, the very nature of *sua sponte* reopening makes it unreviewable, and that does not change based on the types of claims the alien presents. The Board may choose not to reopen a case for a variety of reasons, and the Board is not required to explain why it does not exercise its discretionary *sua sponte* reopening authority. Although the Board often does give reasons for such a decision for the benefit of the parties, the Board's decision to do so should not then make its decision subject to judicial review. If the courts were to hold that the reviewability of decisions not to reopen a case *sua sponte* turned on the reasons the Board gave for such decisions, it would create a substantial disincentive for the Board to explain those rulings for the benefit of the parties. For that reason as well, the court of appeals was correct to find petitioner's claim unreviewable.

2. Contrary to petitioner's contention (Pet. 12-17), the decision below does not conflict with any decisions from other circuits regarding whether decisions not to reopen a case *sua sponte* are judicially reviewable.

a. The courts of appeals have unanimously held that the Board's decision whether to reopen proceedings *sua sponte* is unreviewable because it is committed to agency discretion by law. See, *e.g.*, *Luis* v. *INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali* v. *Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006) (per curiam); *Calle-Vujiles* v. *Ashcroft*, 320 F.3d 472, 474-475 (3d Cir. 2003); *Mosere* v. *Mukasey*, 552 F.3d 397, 401 (4th Cir.), cert. denied, 130 S. Ct. 137 (2009); *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-250 (5th Cir. 2004); *Barry* v. *Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Pilch* v. *Ashcroft*, 353 F.3d

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a timely motion to reopen, he could have obtained judicial review of them.

585, 586 (7th Cir. 2003); *Tamenut*, 521 F.3d at 1004; *Ekimian* v. *INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru* v. *INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Lenis*, 525 F.3d at 1294. This Court recognized this unanimity in *Kucana*. See 130 S. Ct. at 839 n.18 (noting that 11 courts of appeals had "held that such decisions are unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. § 701(a)(2)"). Petitioner acknowledges it as well. See Pet. 12, 20.

b. There is no disagreement in the courts of appeals regarding petitioner's first argument, which is that *all* decisions not to reopen a case *sua sponte* are judicially reviewable after *Kucana*. All of the courts of appeals that have addressed the issue post-*Kucana*—like all of the courts of appeals that had addressed the issue prior to *Kucana*—have adhered to the view that denials of *sua sponte* reopening are unreviewable. See Pet. App. 15a-16a; *Pllumi* v. *Attorney Gen.*, No. 09-4454, 2011 WL 1278741, at *2 n.6 (3d Cir. Apr. 6, 2011); *Sharma* v. *Holder*, 633 F.3d 865, 874 (9th Cir. 2011); *Mejia-Hernandez* v. *Holder*, 633 F.3d 818, 823-824 (9th Cir. 2011); *Neves* v. *Holder*, 613 F.3d 30, 35 (1st Cir. 2010) (per curiam), petition for cert. pending, No. 10-1030 (filed Feb. 14, 2011); *Ochoa* v. *Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010), petition for cert. pending, No. 10-920 (filed Jan. 18, 2011); *Ozeiry* v. *Attorney Gen.*, 400 Fed. Appx. 647, 649-650 (3d Cir. 2010) (per curiam) (unpublished); *Gashi* v. *Holder*, 382 Fed. Appx. 21, 22-23 (2d Cir. 2010) (unpublished); *Jaimes-Aguirre* v. *United States Att'y Gen.*, 369 Fed. Appx. 101, 103 (11th Cir. 2010) (per curiam) (unpublished). That is not surprising, because the *Kucana* Court "express[ed] no opinion on whether federal courts may review the Board's decision

not to reopen removal proceedings *sua sponte*," 130 S. Ct. at 839 n.18, and because *Kucana* concerned a matter of statutory interpretation, not the question whether an agency action was committed to agency discretion by law. There is, accordingly, no court that agrees with petitioner's primary argument about the effect of *Kucana* on the courts' unanimous view that Board decisions not to reopen a case *sua sponte* are committed to agency discretion by law.

c. Petitioner likewise has not established any disagreement in the circuits on his second argument, which is the decision not to reopen a case *sua sponte* becomes reviewable when an alien raises a "constitutional claim" or "question of law." As an initial matter, the court of appeals did not address 8 U.S.C. 1252(a)(2)(D), the statutory provision upon which petitioner relies for his argument that "constitutional claims" and "questions of law" are reviewable. The court held that denials of *sua sponte* reopening are unreviewable based on the rationale that they are committed to agency discretion by law, and it did not discuss whether that rationale admits to exceptions when an alien raises a constitutional claim or question of law. Pet. App. 15a-16a. Although petitioner described his claims as raising constitutional claims or questions of law, so that he could rely on 8 U.S.C. 1252(a)(2)(D), and the court noted this argument, see Pet. App. 7a, the court did not analyze Section 1252(a)(2)(D) or address whether it creates any exception to the general rule of unreviewability. For that reason, even if there were disagreement in the courts of appeals regarding the reviewability of Board decisions not to reopen a case *sua sponte* where the alien raised a constitutional or legal claim, this case would be a poor vehicle in which to consider it.

In any event, petitioner has not established that there is any disagreement in the courts of appeals regarding whether denials of *sua sponte* reopening are reviewable when the alien raises a constitutional claim or question of law. Several of the cases petitioner cites do not address *sua sponte* reopening at all; they address other contexts. See *Rosario* v. *Holder*, 627 F.3d 58, 61-62 (2d Cir. 2010) (although court lacks jurisdiction to review denial of alien's application for cancellation of removal under 8 U.S.C. 1252(a)(2)(B), review of constitutional claims and questions of law is permitted by 8 U.S.C. 1252(a)(2)(D)); *Argueta* v. *Holder*, 617 F.3d 109, 111-112 (2d Cir. 2010) (same); *Cardoso-Tlaseca* v. *Gonzales*, 460 F.3d 1102, 1106-1107 (9th Cir. 2006) (addressing whether the Board has the authority to grant a motion to reopen filed by an alien who has departed the United States in light of the departure bar in 8 C.F.R. 1003.2(d)); *Mendiola* v. *Holder*, 585 F.3d 1303, 1309-1310 (10th Cir. 2009) (same); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 63-64 (1st Cir. 1999) (in the context of a denial of a request for suspension of deportation, court stated that despite a statutory jurisdictional bar, the alien could obtain review of a constitutional claim, but that the alien did not raise a colorable constitutional claim). That courts may consider constitutional or legal questions raised in other contexts does not bear on whether courts may consider such claims in the unique context of a Board decision not to exercise its *sua sponte* reopening authority.[8]

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[8] Petitioner also relies on one decision that is unpublished and nonprecedential; this decision cannot create the type of disagreement in published decisions that would warrant this Court's review. See *Nawaz* v. *Holder*, 314 Fed. Appx. 736, 737 (5th Cir. 2009) (unpublished).

Of the remaining decisions petitioner cites (Pet. 13-15), none of them directly addressed whether Section 1252(a)(2)(D) permits judicial review of legal or constitutional challenges to the Board's decision not to reopen a case *sua sponte*. For example, in *Mosere* v. *Mukasey*, *supra*, the court of appeals stated that decisions not to reopen *sua sponte* are unreviewable, but like the decision below, the court said nothing about whether there should be an exception for challenges that raise "questions of law," and it did not address 8 U.S.C. 1252(a)(2)(D), the provision upon which petitioner relies. See 552 F.3d at 400-401. The same is true of *Belay-Gebru* v. *INS*, *supra*, where the Tenth Circuit held that it could not "consider [the alien's] claim that the [Board] should have exercised its *sua sponte* power to reopen his case." 327 F.3d at 1000. The court did not state any exception to that rule or discuss Section 1252(a)(2)(D).

Cruz v. *Attorney General of U.S.*, 452 F.3d 240 (3d Cir. 2006), considered unique circumstances in which the court could not determine whether it had jurisdiction to review the Board's decision in light of 8 U.S.C. 1252(a)(2)(C), which precludes review of certain decisions concerning criminal aliens; the court "remand[ed] th[e] case to the [Board] to give it the opportunity to" address a preliminary question about the alien's prior conviction and "to decide, based on the outcome of this analysis, whether it should exercise its *sua sponte* authority to reopen [the alien's] case." 452 F.3d at 242-243, 248-249. Although the court recognized that it generally "lack[s] jurisdiction to review [Board] decisions not to reopen proceedings *sua sponte*" because "there is no standard governing the agency's exercise of discretion," it did not rule on whether the particular claim at issue was reviewable because it remanded the case to

the Board for clarification. *Id.* at 249-250.[9] In *Cevilla* v. *Gonzales*, 446 F.3d 658, 662-663 (2006), the Seventh Circuit held that the Board's determination that an alien was ineligible for cancellation of removal did not violate due process. The court's discussion of jurisdiction in that case was premised upon a reading of 8 U.S.C. 1252(a)(2)(B) that this Court rejected in *Kucana*, and the court did not decide the question presented here. 446 F.3d at 660-661.

In *Tamenut* v. *Mukasey*, *supra*, the court held that "the [Board's] decision whether to reopen proceedings on its own motion is committed to agency discretion by law." 521 F.3d at 1004. The court suggested in passing that it "generally do[es] have jurisdiction over any colorable constitutional claim," but the court did not explain the legal basis for that suggestion or discuss Section 1252(a)(2)(D), and the suggestion was *dicta* because the court concluded that the alien did not raise any colorable constitutional claim. *Id.* at 1004-1005. *Lenis* v. *United States Attorney General*, *supra*, is similar: after the court of appeals held that the Board's decision not to reopen a case *sua sponte* is unreviewable, 525 F.3d at 1292-1294, it noted that "an appellate court may have jurisdiction over constitutional claims related to the [Board's] decision not to exercise its *sua sponte*

[9] *Pllumi* v. *Attorney General of United* States, *supra*, is similar: the Third Circuit remanded to the Board because it could not tell whether the Board had denied *sua sponte* reopening based on an "incorrect legal premise." 2011 WL 1278741, at *3. The court stated that although decisions whether to reopen a case *sua sponte* are "are committed to the unfettered discretion of the [Board]," the court may "recogniz[e] when the [Board] has relied on an incorrect legal premise" and "remand to the [Board] so it may exercise its authority against the correct legal background." *Id.* at *2-*3 (internal quotation marks omitted). The court did not discuss Section 1252(a)(2)(D).

power," but then decided that it had "no occasion to examine that question" because "no constitutional claim [wa]s raised," *id.* at 1294 n.7.

Finally, in *Luis* v. *INS*, *supra*, the court of appeals held (in the context of a motion to reconsider) that "the decision of the [Board] whether to invoke its *sua sponte* authority is committed to its unfettered discretion"; "the very nature of the claim renders it not subject to judicial review" and it "is not subject to review by this court." 196 F.3d at 40-41. The court then addressed the alien's contention that the Board's refusal to grant her motion to reconsider her case violated her due process rights and found it "frivolous." *Id.* at 41. Although the court stated that it "ha[d] jurisdiction" to consider that claim, *ibid.*, it did not qualify its holding that denials of *sua sponte* reopening are unreviewable, and (as particularly relevant here) it did not rely upon, or even mention, 8 U.S.C. 1252(a)(2)(D).[10]

Because none of the decisions petitioner cites either expressly adopted or expressly rejected his argument that Section 1252(a)(2)(D) allows judicial review of legal or constitutional challenges to a decision not to reopen a case *sua sponte*, there is no disagreement in the circuits warranting this Court's review.

3. This case would present a particularly poor vehicle to consider the reviewability of Board decisions not to reopen a case *sua sponte*, because all of petitioner's arguments in his motion suggesting *sua sponte* reopening could have been presented to the IJ or the Board in

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[10] The only authority the court cited for the proposition that the alien's due process claim was reviewable was *Bernal-Vallejo* v. *INS*, *supra*, a case addressing denial of a request for suspension of deportation, not a decision of the Board not to reopen a case *sua sponte*. See p. 23, *supra*.

his original removal proceedings. In his removal proceedings, petitioner affirmatively conceded that he is removable as charged, see Pet. App. 5a; A.R. 140-141; see also Pet. 4, and sought only discretionary cancellation of removal, Pet. App. 5a; A.R. 207-214. Petitioner did not argue that the IJ failed to provide him with a list of low-cost attorneys, that the IJ should not have proceeded with his case (after numerous continuances) when petitioner did not have a lawyer, or that the IJ should have determined whether other forms of discretionary relief were available. Then, long after his removal order became final, petitioner filed a motion requesting *sua sponte* reopening, in which he abandoned his request for cancellation of removal and sought to collaterally attack his original removal proceedings. Petitioner did not establish that any of his new arguments was unavailable at the time of his original proceeding. Pet. App. 44a.

The fact that petitioner did not present any new claims that were previously unavailable is relevant for two reasons. First, it underscores the reasonableness of the Board's decision not to reopen petitioner's immigration proceedings *sua sponte*. The Board exercises its discretionary authority to reopen *sua sponte* "sparingly," "as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999). Petitioner's case does not qualify, because he could have raised all of his claims in his initial removal proceeding, but he did not do so, and he did not provide an excuse for his failure to raise these claims. There are strong reasons not to allow an alien to raise this type of collateral attack on final immigration proceedings long after they are completed, especially where (as here) the alien raises claims on which he could

have developed a factual record (such as his allegation that he did not receive a list of low-cost legal providers) or the parties could have developed their legal arguments (such as his claim that he was not removable).[11] Because this case clearly does not raise the types of exceptional circumstances in which the Board has reopened cases *sua sponte*, petitioner's claims would fail even if they were reviewable.

Second, the fact that petitioner could have raised all of his claims in his initial removal proceeding underscores why challenges such as this to the Board's decision not to reopen a case *sua sponte* are unreviewable. As this Court explained in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), there is a fundamental difference between seeking reopening from an agency based on "'new evidence' or 'changed circumstances' that rendered the agency's original order inappropriate," and seeking reconsideration or rehearing based simply on assertions of error in the original decision. *Id.* at 278-282. The Court explained that there is a "tradition of nonreviewability [that] exists with regard to refus[ing] to reconsider for material error, by agencies as by lower courts," which the Administrative Procedure Act, through 5 U.S.C. 701(a)(2), "was meant to preserve," and the Court was "confirmed in that view by the impossibility of devising an adequate standard of review for such agency action." 482 U.S. at 282. Be-

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[11] Although the court of appeals suggested in passing that the alleged failure to provide a list of low-cost legal providers "likely violated [petitioner's] right to due process," Pet. App. 24a, the court did not explain the legal basis for that conclusion, and it simply accepted petitioner's assertion that he did not receive such a list, despite the fact that the IJ offered petitioner such a list on the record, and petitioner stated that he understood his rights, see A.R. 133-134.

cause petitioner's suggestion of *sua sponte* reopening was simply an effort to relitigate his prior removal order—where he attempted to raise arguments that he either forfeited or waived in his initial proceeding—the case for judicial review is particularly weak. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

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